

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4

5 UNITED STATES OF AMERICA,)

6 Plaintiff,)

7 vs.) Case No. 2:18-CR-365JNP

8 JACOB O. KINGSTON, et al.,)

9 Defendants.)

10 _____)

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12

13 BEFORE THE HONORABLE BROOKE C. WELLS

14 -----

15 December 4, 2018

16

17 Arraignment and Status Conference

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19 Transcript of Electronically Recorded Proceedings

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2

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1 December 4, 2018

10:00 a.m.

2 PROCEEDINGS

3

4 THE COURT: Calling particularly United States of
5 America versus Jacob Ortell Kingston, Isaiah Elden Kingston
6 and Lev Aslan Dermen. The United States is represented
7 by -- if you will make your appearances, please.

8 MS. GOEMATT: Yes, Your Honor. Good morning.
9 Leslie Goematt, Arthur Ewenczyk and Richard Rolwing on
10 behalf of the United States.

11 THE COURT: Thank you.

12 MR. GERAGOS: Good morning, Your Honor. Mark
13 Geragos, G-e-r-a-g-o-s, on behalf of Lev Dermen.

14 MR. AGNIFILO: Good morning, Your Honor. Mark
15 Agnifilo with Wally Bugden and Teny Geragos on behalf of
16 Jacob Kingston. Good morning, Judge.

17 THE COURT: Thank you.

18 MR. WILLIAMS: Your Honor, Scott Williams on
19 behalf of Isaiah Kingston.

20 THE COURT: Thank you. All right.

21 Gentlemen, you are here before me this morning in
22 part because the government through the grand jury has
23 returned a document entitled first superseding indictment.

24 Counsel, will you please explain the differences
25 between the two indictments.

1 MS. GOEMATT: Yes, Your Honor.

2 The first superseding indictment adds ten
3 additional charges. The additional charges to the first
4 superseding indictment from the original indictment are
5 first counts 10 through 14, which charge defendant Jacob
6 Kingston with five violations of aiding and assisting in the
7 filing of a false document, 26 U.S.C. 7206(2).

8 Additionally, the first superseding indictment
9 includes five additional money laundering counts, what is
10 commonly called expenditure money laundering in violation of
11 18 U.S.C. 1957. These are counts 21 through 25 charging
12 both Jacob Kingston and Isaiah Kingston with five additional
13 counts of 18 U.S.C. 1957.

14 THE COURT: All right. Thank you.

15 One by one, Mr. Jacob Kingston, do you understand
16 the additional charges or the nature of the additional
17 charges that have been brought against you?

18 MR. JACOB KINGSTON: Yes.

19 THE COURT: All right. And the same for
20 Mr. Isaiah Kingston. Do you understand the nature of the
21 additional charges that you face?

22 MR. ISAIAH KINGSTON: Yes, Your Honor.

23 THE COURT: Mr. Dermen, likewise, do you
24 understand the nature of the additional charges that you
25 face?

1 MR. DERMEN: Yes.

2 THE COURT: All right. Counsel, would you now
3 state the maximum possible penalties that accompany those
4 additional charges?

5 MS. GOEMATT: Yes, Your Honor.

6 The maximum possible penalty for violations of
7 Title 26 Section 7206(2) is a maximum of three years in
8 prison and a maximum fine of \$100,000 for each count. That
9 is as to the new counts 10 through 14 as to defendant Jacob
10 Kingston.

11 The possible penalties, maximum possible penalties
12 for violations of Title 18 Section 1957 are a maximum of ten
13 years in prison per count, and a \$250,000 fine per count,
14 three years of supervised release. It is one year as to the
15 7606(2) charges.

16 By my calculation, Your Honor, the first
17 superseding indictment includes a total maximum statutory
18 prison sentence for Jacob Kingston of 202 years with the new
19 charges, a maximum statutory penalty of 80 years for Isaiah
20 Kingston, and a maximum statutory penalty of 80 years for
21 Lev Aslan Dermen, who does not face additional charges in
22 the first superseding indictment.

23 THE COURT: Thank you.

24 Gentlemen, is there any one among you who does not
25 understand the maximum possible penalties that you now face

1 as a result of the return of the first superseding
2 indictment? Anyone who does not?

3 All right. Seeing no hands, I find that each
4 understands the maximum possible penalties they face.

5 Would any counsel like the indictment read aloud?

6 MR. WILLIAMS: No, Your Honor

7 MR. GERAGOS: No. Thank you, Your Honor.

8 MR. AGNIFILO: No. Thank you, Your Honor.

9 THE COURT: All right.

10 Then, Mr. Jacob Kingston, will you please stand
11 alongside your counsel. What are your pleas, sir, to the
12 additional counts contained in the first superseding
13 indictment?

14 MR. JACOB KINGSTON: Not guilty.

15 THE COURT: Your not guilty pleas will be
16 received, sir. Thank you. All right.

17 Likewise, with Mr. Isaiah Kingston, and
18 Mr. Williams is with him, sir, what are your pleas to the
19 additional counts contained in the first superseding
20 indictment?

21 MR. ISAIAH KINGSTON: Not guilty.

22 THE COURT: Your not guilty pleas will be
23 received.

24 Mr. Dermen, I understand there are no additional
25 counts; is that correct?

1 MR. GERAGOS: That is correct.

2 THE COURT: Then we need not take additional
3 pleas.

4 Thank you. You may be seated.

5 What are the dates currently set? How has
6 discovery been proceeding and what additional do we need to
7 address?

8 MR. GERAGOS: By my understanding, and maybe I
9 will tee it up as to where I think we are, I believe Judge
10 Parrish, after we made the last appearance at the detention
11 hearing for Mr. Dermen, gathered up and did exclusions of
12 time and set a trial date of February 11th. My
13 understanding as to where we are is that the government is
14 claiming that they are going to do yet another superseding
15 indictment.

16 The government also, as has been relayed to me,
17 claims that they are not going to have discovery done until
18 sometime in February. The problem that I have got, and I
19 obviously will file motions, is we're not inclined at this
20 point to agree to any kind of a continuance of the trial
21 date. We wanted discovery yesterday, so to speak. We'll be
22 filing a motion in terms of contesting the government's
23 position that they are not going to give the discovery other
24 than two weeks before the -- the Jencks, at least, until two
25 weeks before because we think that is contrary to the custom

1 and practice in this district, number one, and, number two,
2 it makes the trial completely unwieldy and not able to
3 happen.

4 I want to tee it up and I want to be on the record
5 saying that we plan being ready for trial in February. They
6 can indictment everybody or nobody, I don't care, but as you
7 have seen he is now sitting here and he has got a medical
8 condition, which I have asked for last time to be addressed,
9 which it hasn't been addressed. He is in worse shape now.
10 He has an exploded vessel in his eyeball from the high blood
11 pressure. He is not in the altitude -- we are not getting
12 the discovery and we still have a problem with the so-called
13 filter team, which has been sitting on this for two years
14 and basically has not been given any kind of a deadline.

15 All in all, everything that I have seen -- I am
16 still ready to go to trial in February. He is still ready
17 to go to trial in February. I know that the government
18 wants to take the position, and I don't want to speak for
19 them, but that they are not going to be ready until sometime
20 at the end of 2019. Then they shouldn't have indicted my
21 client, because our position is give us what we are entitled
22 to and let's go to trial. If you don't have a case, that is
23 fine, and we'll put it in front of the jury, but I do not
24 plan on having him sit here and stroke out in the interim
25 while they try and get their act together.

1 I will file the appropriate motions. I would like
2 to walk out of here today with the Court setting some
3 deadlines for them, for the government to comply with
4 certain things, and I would like to keep it on a fairly
5 short leash or have Your Honor keep it on a fairly short
6 leash in terms of the management of discovery.

7 THE COURT: Thank you.

8 MR. EWENCZYK: Your Honor, Mr. Geragos is correct
9 as to the current date of trial that has been set based on
10 the first indictment.

11 With regard to discovery, pursuant to Your Honor's
12 office, the government turned over its first volume of
13 discovery, 420 gigabytes, representing over 800,000 files,
14 on October 5th of 2018. The government then supplemented
15 that original production with a second production that was
16 sent out Friday and received by defense counsel this Monday
17 along with a letter. That was 80 gigabytes and 35,000
18 files. The letter outlines the select remaining items that
19 are outstanding.

20 The major items that remain outstanding have been
21 addressed -- I mean, have been raised by the government for
22 a while. They were raised prior to the first status hearing
23 that we had before Your Honor, and that is that there are
24 two buckets of potential discovery that we need resolution
25 on.

1 The first bucket is -- this case involved a lot of
2 search warrants that were executed. Part of the standard
3 protocol in executing a search warrant for electronically
4 stored information is that the government seizes either
5 devices or images of devices and then subsequently runs key
6 word searches to identify what items are actually relevant
7 under attachment B of the search warrant.

8 So the first bucket is this nonattachment B
9 relevant material that was seized and that did not respond
10 to any of the key words. What to do with that? The
11 government's position is that that is not -- it was seized
12 by the government and has not been reviewed by the
13 government and cannot be reviewed by the government under
14 the search warrant and under law and, therefore, the
15 government's position is that those items are not subject to
16 discovery, and the government would not turn those over
17 absent an order from the Court.

18 The second bucket of evidence is both to physical
19 documents that were seized and electronically stored
20 information that did respond to the key words and that is
21 attached to be relevant. Those items contain potentially
22 privileged materials. In October, prior to the hearing, the
23 government proposed entering into a clawback agreement with
24 the defense to be able to provide the entirety of these
25 materials to the defense, even though the D.O.J.'s filter

1 team has not yet had a chance to examine all of it for
2 privilege. We have been turning over what has been deemed
3 non-privileged, but there are some items that the filter
4 team has not been able to resolve.

5 The defense indicated at the time that they needed
6 more time to discuss it among themselves and that has been
7 their position ever since. When the government sent out
8 this letter on Friday, we attached a more fulsome
9 description of what that might look like and attached a
10 proposed clawback provision. We understand that the defense
11 is now looking at that and we expect them to answer that at
12 some point soon.

13 The basic outline of that is that if the defense
14 agrees to the proposed clawback provision or some provision
15 similar to it, and I have a copy I will present if Your
16 Honor would like to look at it, but essentially saying that
17 these are materials that the filter team has not yet
18 examined. They may contain privileged material. If you
19 agree to be on the lookout for privileged materials, if you
20 agree to set aside any materials that you come across that
21 may be privileged, and to take reasonable efforts to reach
22 out to privilege holders, if you wish to use this material,
23 then we will agree to turn it over to you. That is kind of
24 the status there.

25 And then the last item there is there are items

1 that have been designated as privileged or potentially
2 privileged by the filler team, the D.O.J. filter team, and
3 the government's position is that those items are not
4 subject to disclosure, given that they have been identified
5 as privileged or potentially privileged.

6 Now, with regard to Mr. Geragos's claim that it is
7 the government's position that discovery won't be done until
8 February -- until January -- February, what he is
9 referencing is that the government has stated that we will
10 be seeking a second superseding indictment that will include
11 many more charges and more defendants and we expect to
12 obtain that indictment in mid January.

13 THE COURT: So you do intend on seeking a second
14 superseding indictment?

15 MR. EWENCZYK: Correct, Your Honor.

16 THE COURT: And you'll do that in February?

17 MR. EWENCZYK: Mid January, Your Honor.

18 THE COURT: Mid January.

19 MR. EWENCZYK: Of course, as with any ongoing
20 investigation, there is discovery that arises from that
21 ongoing investigation, so the February date was -- once the
22 indictment is returned, the government just needs a little
23 time to load up that final discovery, process it and send it
24 to the defense, which is where this early February date came
25 in. I mean, that is just a statement about the nature of

1 ongoing investigations, which is that they deal with
2 discovery. The government has turned over substantial
3 discovery. The discovery letter addresses the few items
4 that remain outstanding. We have been in a posture of
5 waiting for the defense to respond to our proposals for
6 handling the two big buckets of information that I have
7 discussed earlier, the nonattachment B relevant materials
8 and the attachment B relevant materials that have not yet
9 been filtered by the filter team.

10 THE COURT: Okay. We have got to look at the
11 bottom lines here.

12 MR. GERAGOS: The problem is from our standpoint,
13 and Mr. Dermen specifically, other than the time period
14 which by statute is excluded from the transportation from
15 the Central District to this District, where I did not fight
16 with the exclusion, we are ready to go. We are ready to go
17 to trial now. February 11th was set by Judge Parrish.
18 That's fine. She excluded the time. We didn't agree to it.
19 I am not agreeing to anything. They can indict him. They
20 can indict his dog for all I care. I don't care. We are
21 ready to go to trial now. We were ready to go to trial
22 yesterday. I just want the appropriate Jencks Act discovery
23 and we're ready to go to trial.

24 I believe that the reason that they are doing this
25 is that they -- I will say it so it is on the record, they

1 are serially indicting because they don't have enough time.
2 They are not ready. They are piecemealing this out because
3 this is part of the fact that they were not ready to go.
4 That would be fine and dandy if the three of them were not
5 sitting in custody. My client is in custody. I don't want
6 to wait for some apocryphal superseding indictment. I want
7 to go to trial. I want to go to trial now.

8 I don't see, based on everything that they have
9 turned over -- in fact, it is also comical the discovery
10 that has been turned over. They are turning over material
11 that I have had for eight years, because I have represented
12 Mr. Dermen for in excess of 15 years. They are turning over
13 material that was actually prepared by my office. So this
14 is nothing but a stall tactic. I think my client
15 specifically is caught up as collateral damage in what is a
16 different investigation. For him to be sitting here while
17 they say that they are going to supersede again in January,
18 mid-January -- mind you, I was sitting at a podium like this
19 in this courthouse when they said they were going to
20 supersede the first time and bring charges against him in
21 order to get Her Honor, Judge Parrish, not to grant him bail
22 in the first place.

23 I want to be crystal clear. We are ready to go.
24 We don't have to wait for February. I can try this case
25 starting the end of this month or in February.

1 THE COURT: That is not going to happen. That
2 trial date has been set.

3 Now, I want to know from the government when will
4 discovery be complete?

5 MR. EWENCZYK: Well, Your Honor, as I mentioned,
6 given that there is this ongoing investigation, the
7 government expects to have discovery complete with relation
8 to this ongoing investigation in early February, which is
9 the time that we need to turn around stuff that gets
10 disclosed.

11 THE COURT: What about going to trial on what you
12 have?

13 MR. EWENCZYK: You mean based on the --

14 THE COURT: On the charges that are now --

15 MR. ROLWING: Yes, Your Honor. Rich Rolwing for
16 the government.

17 These three gentlemen are detained --

18 THE COURT: Yes.

19 MR. ROLWING: -- because they are a flight risk
20 and their safety and their danger to the community, in part,
21 for Mr. Isaiah Kingston. They were planning to flee to
22 Turkey with the money that they stole from the government,
23 as we presented in all of the detention hearings, and that
24 is why they are detained. We brought substantive defenses
25 that were supported by the evidence that we had gathered at

1 the time in order to be able to prevent their flight to
2 Turkey with the proceeds of their crime.

3 We continue this investigation. We are receiving,
4 pursuant to grand jury subpoenas that are lawfully issued by
5 this grand jury that is investigating their conduct, every
6 week new evidence. We are processing it and analyzing it,
7 Bates'g it and producing it. That will continue. We have
8 from the very start informed the defense counsel and the
9 Court that we are seeking to bring a full panoply of charges
10 that will hold them responsible for the entirety of their
11 criminal conduct as it relates to this biodiesel tax fraud
12 and are moving forward in that direction.

13 We originally hoped to do it by the end of the
14 calendar year. I have now informed defense counsel today it
15 is going to be mid January, a couple of weeks after the end
16 of the calendar year, and we intend to meet that date. We
17 have informed Judge Parrish that there is going to be an
18 effect on the Speedy Trial Act time when the superseding
19 indictment is returned with the breadth of charges that we
20 intend to bring.

21 Once this grand jury completes its investigation
22 we will have a new speedy trial computation. At that time
23 we believe that will be the final charging instrument that
24 relates to the biodiesel tax fraud these three gentlemen and
25 their coconspirators who will be charged with them,

1 committed throughout the course of 2010 through 2016, and it
2 is at that time that we will finalize the final production
3 of the discovery that we're continuing to amass every week
4 during the ongoing nature of this criminal investigation.

5 THE COURT: Is it correct that some of that
6 information was provided originally by Mr. Geragos?

7 MR. ROLWING: He must be referring to -- I don't
8 know what Mr. Geragos often refers to. There is certainly
9 material that we have obtained through grand jury subpoena
10 and other witnesses that relates to Mr. Dermen and his
11 previous involvement with Mr. Geragos, but that is a minor
12 amount of the discovery. The bulk of the discovery deals
13 with the biodiesel tax fraud conduct of these three
14 gentlemen and it has been produced. The bulk of what we
15 have in our possession today, but for the last few weeks of
16 things that we have just received, has already been
17 produced.

18 What Mr. Geragos is complaining about is the
19 Jencks witness statements and he will have those in time to
20 prepare adequately for the defense of his client when we
21 have a final trial date. But I propose that this
22 February 11th trial date will not stay given a second
23 superseding indictment of full charges, many more against
24 Mr. Dermen for his conspiratorial conduct and his money
25 laundering conduct, and that we will have a -- we should get

1 a final trial date at that time when we arraign them on the
2 full panoply of charges.

3 That is all I can say. This grand jury is working
4 expeditiously and it is a very complex investigation
5 involving a number of documents and a number of crimes and,
6 as you know, it involved a half a billion dollars that these
7 gentlemen stole from the government. We have had
8 discussions about this with defense counsel today and in the
9 past, and we're fully informing them of our plans, which is
10 a little bit unusual, but that is why we are doing it, so
11 that the Court and we can all plan accordingly.

12 There is no need for Judge Parrish to have five
13 weeks set out in February on her calendar for a trial that
14 Mr. Geragos, although he claims he is ready to try this, has
15 not even looked at the evidence we have presented him in
16 discovery today, and we will be providing him much more
17 discovery related to the final charges we bring. He can
18 claim all he wants that he is ready to try it tomorrow or
19 yesterday, but the reality is that he is in a charge -- he
20 will be charged with conspiracy with these gentlemen and
21 others and that will require a trial date that accommodates
22 all of the defendants involved in their conspiratorial
23 conduct.

24 THE COURT: Do we need to vacate that February
25 date?

MR. ROLWING: Well, we have had discussions with defense counsel about that. Of course some are on board with the vacation and Mr. Geragos is not. I suggest that Mr. Geragos, if he has all these ideas about the injustices his client is facing, that he should file motions instead of just come and announce things in court and we'll respond to the motions. He has not filed anything and he should do so.

I also am told that one of the defendants will be filing a motion to vacate that trial date, requesting a continuance that makes sense, given what we have informed them this investigation will result in.

THE COURT: All right.

MR. WILLIAMS: Judge, can I be heard, please?

That was a nice opening statement, but I don't remember and I don't read in the Speedy Trial Act or anywhere else in the law where we ask courts to consider hypothetical court dates based on hypothetical charging documents that haven't been filed. I disagree with the government's rendition in some respects to discovery, and I do agree with Mr. Geragos's characterization that what I see in the discovery process or lack of discovery and delays in discovery are factious excuses that are designed to force a continuance and not to actually comply with the discovery.

It is true that on 10-5 we received, after we begged the government to give us in native format, if

1 necessary, discovery in this case so that we could begin to
2 prepare and sent them data storage devices to provide the
3 discovery on. They sent back approximately -- I think
4 roughly 800 gigabytes of discovery and we optimized it and
5 have been working to prepare for trial based on that. We
6 don't find any of that that could remotely be related to,
7 quote, a continuing investigation.

8 This case was essentially investigated starting in
9 2016, February of 2016 after a raid of seven or so
10 businesses and all the computers were seized and searched.
11 It is old. These superseding indictments are based on
12 saving statutes of limitations and they are not based on new
13 investigations. I completely disagree with the
14 characterization that this discovery couldn't have been
15 provided on day one of the indictment, which was August 8th.

16 The supplemental discovery, as you heard, came to
17 us yesterday. We were told to provide a terabyte gig and
18 did so I think about ten days ago. Again, we provide the
19 data storage. It has 80 gigs on it. We could have done a
20 thumb drive two months ago. We don't know, it is true, what
21 is on it and it was provided yesterday together with some
22 other letters that have been referred to.

23 I need to turn to that, the two buckets that you
24 heard about. One is called the nonattachment and
25 de-relevant, and in the letter there is a suggestion that

1 there is a need for an order from this Court to provide it.
2 I hereby move for providing the nonattachment, de-relevant
3 material. I have told the government from the very first
4 communication I had with them that I will take discovery any
5 way you will give it, as soon as you can give it, in any
6 format you will give it. I want it. I have never in terms
7 of protective orders or specific discovery orders, I have
8 invited the government to draft them in their own terms and
9 they would likely be signed within the day. I want
10 discovery.

11 THE COURT: What is your bottom line, Mr.
12 Williams?

13 MR. WILLIAMS: The bottom line is --

14 THE COURT: Are you ready to go on February 12th?

15 MR. WILLIAMS: This Court said consistent with the
16 Speedy Trial Act, set the trial date for my client, who has
17 been detained from day one, for October 29th. That was
18 vacated without any input from us at a hearing where we were
19 not even present, by another magistrate judge. Ultimately
20 the trial date that has been set was set without any input
21 from us and we are not moving to vacate it. It is playing
22 into the government's charade to ask if someone is ready
23 when they are admitting they have not given us discovery but
24 we are ready.

25 THE COURT: I hear you doing two things. I hear

1 you complaining, perhaps legitimately so, complaining about
2 the lack of receipt of discovery, while at the same time
3 saying that you're going to be ready to go.

4 MR. WILLIAMS: No, I'm saying we are not falling
5 for it and we are not joining in any kind of idea that we
6 are going to set out some court dates. By the way, maybe
7 the government could be asked to demonstrate exactly what is
8 new and what hasn't been provided. I'm not aware of the
9 discovery rule that says since any case might have a
10 superseding indictment because it is a continuing
11 investigation and we'll be in charge of deciding when the
12 timetable is for providing discovery. I have never heard
13 that.

14 There is always the possibility of a superseding
15 indictment. We don't proceed on the possibility of
16 superseding indictments and the threats of superseding
17 indictments. Before this Court is an indictment. My client
18 has lost 25 pounds in custody. He may not make it to
19 February. I don't know. But he is in custody and we are
20 not agreeing to any delays and we are not falling for the
21 trap of, well, you can't say you're ready, Mr. Williams,
22 because you're also saying you don't have discovery. If
23 they give discovery, and I don't think it was fair that it
24 was given that late, I will move the Court to exclude those
25 witnesses. I will move for a trial remedy. But it is

1 completely unfair for the government to come in with all
2 their horses and bulldoze into a detention hearing and then
3 put everybody in jail and then sit back and cavalierly talk
4 about how they will control the discovery schedule and they
5 will control the trial schedule.

6 THE COURT: They didn't put them in jail. I did.

7 MR. WILLIAMS: Right. But once you did, you put
8 the onus on the government to give them a trial in a timely
9 fashion and they are not doing it.

10 THE COURT: All right. So what is it that you
11 want?

12 MR. WILLIAMS: I want to make the record I just
13 made. I want discovery. I agree to any orders they want in
14 order to release him. The filter representations are false.
15 The filter team had the material as far back as April of
16 2018. There is no need for the orders that they think are
17 necessary to produce them. I want to make the record that
18 from day one I have said draft your own proposed orders with
19 relation to any discovery. I will sign them so that I can
20 get the discovery.

21 I don't see why there isn't a deadline. I don't
22 see why the deadline -- we're going to get this discovery
23 and we're going to show the Court that it could have been
24 provided two years ago. This investigation was from
25 activity six to four years ago, allegedly. It has all been

1 seized as of February of 2016.

2 Now, sure, they are going to bring more
3 tattletales or maybe they are going to turn more informant
4 witnesses as, you know, they prepare for trial. That is
5 called rolling discovery. That is called providing
6 discovery when you have it. We don't wait until some big
7 superseding indictment and then provide discovery that has
8 existed for two years. I don't see why they can't have an
9 order to provide everything that is in their possession that
10 they think is at all relevant material or probative on a
11 storage device by next week. Ask them why they can't do
12 that? We are not agreeing to vacating the trial date.

13 THE COURT: Mr. Rolwing is jumping up. Let me
14 hear from defense counsel, all of them, and then we'll allow
15 the government to respond.

16 MR. AGNIFILO: Thank you, Your Honor.

17 Your Honor used the term bottom line twice today
18 and I think it is a day where we're looking for the bottom
19 line. I have not yet made an application for release on
20 conditions for Mr. Jacob Kingston yet, because the two
21 codefendants, who I think the government would say were less
22 involved in the conduct, have not been released. And the
23 fact that the defendants are all detained really is the crux
24 of the problem.

25 This is a tax case. It is a complicated tax case.

1 It is a tax case with a lot of moving parts. It is a tax
2 case with a fair amount of cooperating witnesses, but it is
3 a tax case. I think the pressure, if you're feeling a
4 certain measure of, I don't know, of frustration or emotion
5 from the defense side, is because we feel like we are sort
6 of in a box. We have a very complicated case, a case with
7 very serious consequences, and a case that is difficult to
8 prepare for because it has a lot of different moving parts
9 to it and we have our three respective clients in jail.

10 I'm listening to what Your Honor is saying and I
11 am trying to find a bottom line that works. The government
12 on the other side is saying, well, we are going to supersede
13 the indictment, as is our right, in January, so we can't
14 possibly have a trial in February because we're going to
15 have new defendants and brand new defense lawyers who don't
16 know anything about the case until they come into the case
17 at some point in the third week of January or so.

18 By the same token I am mindful of Judge Parrish's
19 schedule. If we know we're not going to have a trial in
20 February, I want to tell the judge as soon as possible so
21 that she does not set the time aside. We're in the middle
22 of this sort of conundrum. I think what is probably going
23 to happen in the next few weeks, and I know we're coming up
24 on the holidays soon. At some point I am going to make an
25 application to Your Honor for release of Mr. Jacob Kingston

1 on conditions, since I have not done so yet.

2 I understand the government's position that people
3 are going to run to Turkey. I think at the end of the day
4 with the discovery we have, with the fullness of time, I
5 believe I'll be able to make a fairly persuasive written
6 application that that is just not the case. We'll see if
7 that trickles down to the other two defendants.

8 What this case really needs, in the best of all
9 worlds, which we don't have right now, is we would need a
10 certain amount of time, months, many months for us to get
11 ready to try the case. That would be the perfect situation.
12 Trying the case in February is decidedly imperfect because
13 we are still getting discovery. It is a monumental amount
14 of discovery. I have never known what a terabyte was until
15 the last few years and I still don't really know what it is.

16 THE COURT: I don't either.

17 MR. AGNIFILO: It is a lot. It is a mountain of
18 information. So the answer, reasonably speaking, is we need
19 time. We need to take a deep breath on the defense side and
20 sit down with our clients and really figure out how we are
21 going to defend this tax case. That is what it is. There
22 is no violence in this case. There are no guns, there are
23 no knives, none of those things in this case. It is a tax
24 case. How do we settle down and really prepare for this tax
25 case so that the Court gets good motions on this complicated

1 case and so that we're all prepared to try this complicated
2 case, and so that our clients who are in jail get the type
3 of representation that they really need, because they only
4 get a chance to go through this once.

5 It is a tricky case. I mean, no one is pleading
6 guilty because it is a tricky case, and I'm not going to
7 comment too much on the evidence, but there is a little here
8 for everybody and there is certainly a defense side to this
9 case that is a very pronounced defense side that I think is
10 going to be a strong argument on the defense side. The
11 first thing that I think I am going to do is ask -- get
12 permission from Your Honor at some point to make that
13 application that Mr. Jacob Kingston be released on
14 conditions. I will start putting that together.

15 THE COURT: You can make that application at any
16 time.

17 MR. AGNIFILO: Thank you, Judge.

18 The other thing, and it was alluded to I think by
19 Mr. Geragos in his remarks, is I believe that what really
20 would help the defense in this case is if we could get the
21 Jencks material, the 3500 material sooner rather than later,
22 even if it is for attorneys' eyes only. I say that because
23 the mountain of discovery we're going to have, that would be
24 handy. I mean, you know, as in most cases 90 percent of the
25 mountain is irrelevant to us. We have to figure out the ten

1 percent or five percent or even one percent that is
2 relevant.

3 The way that we do that expeditiously is if we
4 have an idea of what the witnesses are going to say.

5 Now, so what I'm going to do as well, Your Honor,
6 if Your Honor sees fit, is to provide a written motion on
7 that point, because I think the government has a viewpoint,
8 and I think the government's viewpoint, and I won't speak
9 for them, is they have concerns with witness safety and I
10 don't begrudge them those concerns. So rather than doing
11 this here with our limited time, I'm going to submit a
12 written motion to Your Honor along those lines as well.

13 I don't know until I make the motion and we have a
14 hearing, and obviously if Mr. Jacob Kingston can get out on
15 very strenuous conditions that would certainly alleviate a
16 lot of the pressure on everybody, but in a short time I will
17 make the motion for the Jencks material. Your Honor, the
18 bottom line is hard to find given all of the competing
19 concerns, but I will certainly endeavor to try and find
20 something that is workable for the Court.

21 THE COURT: Thank you.

22 MR. AGNIFILO: Thank you, Judge.

23 MR. EWENCZYK: Your Honor, I will leave the Jencks
24 issue aside pending a motion from the defense.

25 With regard to the discovery, I just have to

1 correct some notions that were put before the Court that are
2 simply incorrect. Just to restate, on October 5th the
3 government disclosed 420 gigabytes of relevant evidence in
4 this case. It didn't just dump it on the defense. It
5 organized it clearly and it conferred with the defendants
6 to know what format they wanted to receive it in. You heard
7 Mr. Williams talk about native files. Native files were
8 requested and native files were what were produced. We
9 organized it and we provided them with an index. We did
10 everything that we could to help them review what is
11 admittedly a large amount of evidence, because this was a
12 wide-ranging fraud that the government is now prosecuting.
13 So 420 gigabytes were produced on October 5th.

14 Now, Mr. Scott talked about rolling productions.
15 Well, that is exactly right. So then on Friday we produced
16 a second set, 80 gigabytes. This represents at this point
17 the vast majority of the evidence, setting aside the two
18 buckets we disclosed and the Jencks evidence. In a careful
19 letter, that is several pages long, that I wrote, I
20 explained of the items that we have that are outstanding
21 there are a small handful that were not produced
22 electronically here and I apologized for that. There were
23 some technical glitches at the last minute and there were
24 some issues and here they are. I am working to get them to
25 you by the end of this month.

1 So at this point they have received 500 gigabytes
2 of evidence. This is not material that we received from Mr.
3 Geragos that we turned back. This is search warrants that
4 were executed that contained e-mails from Washakie Renewable
5 Energy. This is subpoena responses. This is materials that
6 the government -- this is a vast array -- I mean, this is
7 500 gigabytes of relevant evidence that the government has
8 tried to organize as carefully as possible to assist the
9 defense in their review of this evidence and to keep us all
10 on track toward a resolution of this matter.

11 I want to dispute this idea that somehow we have
12 not been providing discovery.

13 THE COURT: Okay. I don't have an issue with that
14 and it appears that you have, the question and the bottom
15 line question is when can you conclude it?

16 MR. EWENCZYK: Your Honor, we are working toward
17 turning over the remaining items, but this is an ongoing
18 investigation, and so Mr. Williams talked about -- he talked
19 about rolling productions, and the truth of the matter is
20 that in any ongoing investigation, there is evidence coming
21 to light that is relevant to the first indictment and to the
22 first superseding indictment. Of course we turned that
23 over, you know, as soon as we could. It takes us a
24 little -- it takes us about three weeks. We receive it and
25 Bates stamp it and process it and send it over.

1 So, I mean, if Your Honor is asking, you know,
2 about discussions as my colleague represented, we feel that
3 this investigation in terms of the indictments that concern
4 the defendants will conclude in mid January, and then with a
5 little turnaround time, early February we'll disclose all of
6 the information that has been gathered as part of this
7 ongoing investigation. I want to emphasize that these are
8 rolling materials. This is rolling production. That is
9 exactly what Mr. Scott himself stated is usual, the normal
10 course of business in these cases.

11 THE COURT: Well, I am asking you, I suppose, can
12 you speed it up? I understand it is part of the ongoing
13 investigation. But, you know, maybe you need to speed it
14 up. How can you do that?

15 MR. EWENCZYK: Well, Your Honor, I mean, until the
16 indictment is returned by the grand jury, we have materials
17 coming in and I can try to speed it up until I am blue in
18 the face, but, you know, until we receive the materials I
19 can't -- I can't turn them over. I'm trying as fast and as
20 diligently as possible to get things into the pipeline and
21 produced to the defense. We raised on October 1st the issue
22 of these two buckets of information.

23 THE COURT: Okay. You're not answering my
24 question.

25 MR. EWENCZYK: Your Honor, the government is doing

1 everything it can to disclose this as fast as possible.

2 MR. ROLWING: Your Honor, if I might, there is
3 some misunderstanding possibly by the defense counsel about
4 our discovery that is leading to this question. As
5 Mr. Williams inaccurately portrayed, we are not holding
6 things back and producing them willy-nilly later on. We
7 produced the bulk of what we already had, other than the
8 last few weeks of stuff that is being returned pursuant to
9 grand subpoenas in the ongoing investigation, which we'll
10 produce on an ongoing, rolling basis.

11 That is the rolling nature of the production, with
12 the exception of a few matters that the government has
13 identified in the letter and is in discussions with defense
14 counsel about how quickly they can get them the materials we
15 have in our possession. But the bulk of what we already
16 have in our possession has been disclosed in these two
17 tranches of discovery. I think that that is the
18 misunderstanding by defense counsel that is leading to this
19 question.

20 There is no rushing the grand jury. These
21 subpoenas are due and the grand jury meets every two weeks
22 and the subpoenas call for the production of records when
23 we get them. Next week or this week we'll process them and
24 put them into the rolling production for the next tranche of
25 discovery. There is no rushing the grand jury subpoena

1 dates of return.

2 THE COURT: No, but there is the ability of the
3 government to contact its investigators and those who have
4 been issued subpoenas to hurry their responses.

5 MR. ROLWING: There is that, Your Honor. Normally
6 the witnesses and entities that are subject to grand jury
7 subpoenas calling for the production of records on a certain
8 date --

9 THE COURT: I understand.

10 MR. ROLWING: -- produce them on that date. They
11 prepare that and take a lot of effort to do so, to prepare
12 those on that date.

13 However, we are reaching the end of the
14 investigation and the drafting of the panoply of charges
15 that these gentlemen and the punitive codefendants will
16 face, and I think that that will be in shape by the end of
17 the year and brought before the grand jury mid January and
18 presented. Then we'll be in a position to have turned over
19 virtually everything that we have in our possession,
20 especially if these other two categories of evidence are
21 dealt with by the clawback agreement.

22 I was edified to learn from the defense community
23 today that the clawback agreement that we proposed in this
24 latest discovery letter is something that they are willing
25 to work towards resolving and agreeing to. I think we're

1 going to reach an agreement on those two categories.

2 However, Mr. Williams' motion to the Court to
3 order the government on the first category, we'll need a
4 court order regarding that, because it is our position that
5 that first category of evidence, that is just the image of
6 electronic data seized in the search warrant that is not
7 responsive to the search warrant, is not in the
8 government's -- the prosecution team's possession and is not
9 subject to our discovery obligations unless the defense
10 counsel requests the Court to order us to produce those.

11 MR. GERAGOS: On August, I believe it was the
12 28th, I had the first hearing with Mr. Dermen in the Central
13 District. I heard the same bluster from the government
14 about the charges that are coming. That was over 120 days
15 ago. We said then, and I said it on the record then, that
16 they didn't understand their case, at least to Mr. Dermen,
17 and we were ready to go. October, I forgot whenever it was
18 when I was here before, they said the same bluster that we
19 have got more charges coming. It has been in excess of the
20 Speedy Trial Act since then. We have had appearance after
21 appearance after appearance where the Speedy Trial Act has
22 been obliterated.

23 Basically this has become a template for the
24 Speedy Trial Act no longer apparently applies if it comes to
25 a tax case, because all you have to do is get up and just

1 bluster and talk about a panoply and this and that. The
2 fact is that I said since August the 28th in the Central
3 District they don't understand at least Mr. Dermen's role in
4 this case and we're ready to go, because I have been down
5 this road before with the government.

6 I said it again when we were here before before
7 Judge Parrish and I said it again before the other
8 magistrate. The idea that somehow it is an ongoing
9 investigation, but virtually the first tranche, as they call
10 it, of discovery was nothing other than stuff that was
11 seized two and a half years ago on terms you already know.
12 On February 16th they seized all of the materials and that
13 was the first tranche. If they were not ready, then they
14 shouldn't have gotten the indictment. I just want a trial
15 date.

16 THE COURT: But they got the indictment when they
17 got it. What they should have done and what they shouldn't
18 isn't what is before me.

19 Now, you say I'm ready to go on February 12th or
20 whatever the date is.

21 MR. GERAGOS: Correct.

22 THE COURT: I'm ready to go. That means that you
23 think that you don't need any more discovery or you need it
24 all very soon?

25 MR. GERAGOS: Correct. I would like an order from

1 the Court, contrary to what they have said, which is that
2 they would provide the Jencks material two weeks before, and
3 my understanding, at least in the central -- where he
4 originally was arrested, and my understanding is that the
5 culture here is that that is not appropriate. I would like
6 them to comply with what goes on in every other case in this
7 district, which is if they want to give it as attorneys'
8 eyes only in a certain time period before, that the Court
9 order it --

10 THE COURT: I am not familiar with any custom in
11 the district that says you can turn it over in advance, I'm
12 just not. Now, maybe there are some judges who have done
13 that, but I don't think that that is necessarily the custom
14 here.

15 All right. What I am considering here so that we
16 can get this rolling, and I have my drug court people that
17 are coming in, so we're going to have to cut this a little
18 bit short, but I want to know a final date from the
19 government, assuming that they assert their February 12th
20 date. Now I know that this other indictment may be coming,
21 and I know that it may have an effect on the trial date, but
22 so far they are demanding the discovery. When is the date
23 that you can give that on the matters presently before the
24 Court? Give me a final date.

25 MR. ROLWING: Your Honor, we'll have -- we have

1 already produced the bulk of all that we have --

2 THE COURT: I heard that.

3 MR. EWENCZYK: -- that relates to that so they
4 have that.

5 So he is complaining about Jencks, a whole
6 different matter. If he wants that early, he needs to file
7 a motion. What I am familiar with is the Jencks Act. That
8 is the way I operate and I am willing to work with them and
9 I have communicated how we're going to treat the witness
10 statements, but that is a whole different matter. That is
11 not discovery. He tends to combine those two when he talks.

12 THE COURT: Let's separate them out.

13 MR. ROLWING: Okay.

14 THE COURT: He is going to have to file the
15 appropriate motion on the Jencks materials.

16 Now, when can you provide a conclusion to the
17 discovery related to the present superseding `indictment?

18 MR. ROLWING: We'll have the remainder of this
19 material, that we have in our possession now, to them by the
20 end of the month, but we anticipate receiving more
21 information in the next few weeks. Some of that might
22 relate to, because of the conspiracies that are being
23 investigated that encompass some of the substantive charges
24 that have been brought against these defendants, some of
25 that evidence that comes in might relate to those. We will

1 most certainly have it to them by the end of the month we
2 bring the superseding indictment in, February 1st, but we're
3 going to have -- I can't tell you whether --

4 THE COURT: I may set a deadline, so give me your
5 bottom line. When can it be produced?

6 MR. ROLWING: Well, we have already produced it.
7 What I am talking about are things that have been identified
8 that we have in our possession that we're working towards
9 giving them, and those things that we have in our possession
10 that we're working towards giving them will be given to them
11 certainly by the end of this month. And we have also
12 identified that there is a whole load of hard copy records
13 made available for inspection by them, and those are at
14 their --

15 THE COURT: Are they ready now?

16 MR. ROLWING: They have available for their
17 inspection.

18 MR. GERAGOS: Would the Court entertain just a
19 short order, then, that by December 29th, that they turn
20 over everything that they have?

21 THE COURT: That they have as of that time.

22 MR. EWENCZYK: If I may, there is also the issue
23 of the unfiltered material, and we have been asking the
24 defense since early October what position they want and
25 whether they are willing to jointly request from the Court

1 an order as to its discovery pursuant to a clawback
2 proposal. We did not hear an answer from defense counsel.
3 We have now proposed a clawback agreement, but Your Honor is
4 asking about discovery, and that is potentially a discovery
5 obligation of the government, and I just want to be up front
6 that we're trying to work toward a resolution to produce
7 this stuff, but we need the defense to agree to something
8 because these could contain privileged materials.

9 THE COURT: Okay. There are three of you trying
10 to talk. It should be one at a time.

11 MR. ROLWING: I apologize, Your Honor.

12 If I might finish Mr. Ewenczyk's thought there,
13 because this particular category that is proposed to be
14 subject to the clawback agreement we have provided them, in
15 the absence of them providing us a proposal, is attachment B
16 relevant? That is, matters that were secured from the
17 electronic E.S.I., seized in the search warrant, that are
18 responsive to the search warrant, but not yet in our
19 possession because they are with the filter team and they
20 have not filtered it all, so there is potentially privileged
21 material in there, and we're just trying to propose a
22 protocol that would respect the privilege holder's privilege
23 and allow the defendants to have access to this material as
24 soon as they can agree to respect the privilege and have
25 access to it to prepare for trial. That is what we have

1 proposed. We are hopeful they can get there, but it seems
2 to have slipped defense counsel's focus, because there is a
3 lot to focus on in this case, and they have not come up with
4 a protocol and so we provided this clawback agreement.

5 We're told by Mr. Agnifilo today that they think
6 they can work with it. They are in good discussions with
7 their colleagues about getting there, but that is on them or
8 the Court. We have identified this material that we don't
9 have possession of, and the filter team does, and that may
10 have privileged holders, potential privileged material in it
11 and we have suggested that they agree to respect that in
12 agreement to get the material so they can prepare for the
13 trial.

14 MR. GERAGOS: It is a very simple issue. I would
15 ask the Court, bottom line, to order them to turn over
16 everything they have by December 29th. I have bequeathed
17 before to Mr. Agnifilo that whatever agreement he wants to
18 enter into, because the way I view it is that the privilege
19 material is going to be largely his and the other
20 codefendant and it is not my fight. I don't need it. I
21 just need the material because Mr. Dermen is not in the
22 middle of this.

23 What I would propose is the Court order that they
24 turn over everything by December 29th. In addition to that,
25 I am stating on the record here that I have bequeathed to

1 Mr. Agnifilo that whatever agreement he wants to enter into
2 with the government for the filter team, because when my
3 office talks to the filter team they say that, frankly, they
4 have not even started it yet. I don't care whatever
5 clawback arrangement he wants to enter into, I'm okay with,
6 because it is his issue with his privileges, not ours.

7 MR. AGNIFILO: I think I can solve the problem on
8 this, since I have been bequeathed the issue. We'll have
9 agreed upon language by the end of the week and the Court
10 will never have to deal with this again. So we'll have an
11 agreement on the clawback and so that won't be a problem.

12 THE COURT: All right.

13 MR. ROLWING: If I might request, there has been a
14 motion by defense counsel Williams regarding the material
15 that is not with the filter team. That is, it is with the
16 seizing agency's team. They took an image of this E.S.I.
17 We don't intend to turn that over because none of that -- we
18 only selected the attachment B relevant items from that
19 material, and that is what we have been turning over, but if
20 they want that material, they should file a motion with the
21 Court and we will follow the Court's order on that, and we
22 would request that that production also be subject to any
23 clawback provision, since there might be potentially
24 privileged material in there as well.

25 We can work that out.

1 MR. WILLIAMS: Consistent with what I have told
2 the government, as I have stated and can prove by e-mails
3 from day one, they can draft any clawback and I will agree
4 to it the next day. I am hereby moving, orally, it and I
5 think that that is sufficient for the order that the
6 government is requesting and could have requested that order
7 on the date of the initial appearance in October.

8 THE COURT: Repeat the nature of your motion.

9 MR. WILLIAMS: I would ask the government to make
10 the request to Your Honor for what words they would like to
11 hear from you for you to grant to give us the discovery that
12 they're talking about.

13 THE COURT: All right.

14 MR. EWENCZYK: Your Honor, we received conflicting
15 responses from defense counsel over the course about what
16 they want to do, given that some of their clients are
17 potentially privilege holders in this, and so we have been
18 trying to work this out in earnest. But I just want to
19 point out to Your Honor in a week it will be December 11th,
20 you know, and, Your Honor, I am committed to make this go as
21 fast as possible and certainly as fast as Your Honor orders,
22 but I just would implore the Court to keep in mind that in a
23 week from now it will be December 11th and then, you know,
24 December 21st is the first day before the holidays, and I
25 will do whatever I can, but, I mean, things slow down.

1 THE COURT: I think you have control over your
2 agents and your employees who would need to go through the
3 materials and then your filter team and it is really not
4 going to be an excuse that the holidays are coming. That is
5 just a burden that you have. All right.

6 This is what I want to do. I want each of you to
7 submit the appropriate motion with a proposed order for your
8 particular circumstance. Likewise, I would like the
9 government to respond to those or make any motions that you
10 think are appropriate, and because of the sensitive time
11 line, I'm going to ask that those be given to me no later
12 than Friday.

13 MS. GOEMATT: Thank you, Your Honor.

14 THE COURT: Is there anything else at this time?

15 MS. GOEMATT: Not at this time given that you have
16 a full courtroom. Thank you very much, Your Honor.

17 THE COURT: All right.

18 (Proceedings concluded.)

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